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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of US WEST Communications, Inc., for a Declaratory Ruling Regarding the Provision of National Directory Assistance	)	**CC Docket No. 97-172**

BELLSOUTH REPLY

BellSouth Corporation, on behalf of BellSouth Telecommunications, Inc. ("BellSouth"), hereby submits this Reply in response to comments on the Petition for Declaratory Ruling filed by US West Communications, Inc. ("US West"), to initiate this proceeding.[1] US West asked the Commission to confirm that its offering of a national directory assistance ("NDA") service on a centralized basis using the 411 dialing code is a permitted activity under the Act.[2] US West's Petition garnered substantial support from other LECs, including those offering or planning to offer similar NDA services.[3]

The only opposition to US West's Petition came from IXCs who presently have the market cornered on NDA service and who thus perceive a potential competing service offering to be a threat to their cozy business. As shown in supporting comments and discussed below, however, the arguments relied upon by these opponents to protect their turf are not supported by applicable law. Indeed, the comments show not only that LEC- and BOC-provided NDA service

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1 *See*, Public Notice, DA 97-1634 (rel. Aug. 1, 1997).

2 The Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq.* ("the Act").

3 *See*, Comments of BellSouth; Southwestern Bell, *et al.*; Bell Atlantic; and Roseville Telephone Company.

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is permitted, but that it is a service customers want. Accordingly, the Commission should grant US West's Petition and confirm that NDA service provided on a centralized basis behind 411 dialing is permitted and appropriate for BOCs and other LECs.

I. Arguments of "What Would Have Been" Under the MFJ Are Inapposite.

MCI and AT&T, in opposing US West's Petition, continue down the erroneous path of arguing that NDA service would have been impermissible under the MFJ and therefore must be impermissible under Section 271[4] of the Act. Such an argument, however, is a *non sequitur*. The Act, not the MFJ, is the controlling legal authority, and arguments of what "would have been" under the MFJ are of no avail.

BellSouth observed in its Comments that Congress expressly directed that any "conduct or activity" subject to the Consent Decree prior to the passage of the Telecommunications Act of 1996 "shall *not* be subject to the restrictions and obligations of such Consent Decree" after passage of the 1996 Act.[5] Instead, Congress adopted a new statutory framework in lieu of the judicially administered Consent Decree. And, in so doing, "Congress did not simply codify the existing MFJ interexchange prohibition, but wrote a new restriction, using new terms based on new definitions."[6] This overt avoidance of codification of the MFJ presents a compelling

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[4] 47 U.S.C. § 271.

[5] BellSouth Comments at n.12, *quoting* Telecommunications Act of 1996, Pub. L. No. 104-104, Sec. 601(a)(1), 110 Stat. 56, 142 ("the 1996 Act") (emphasis added).

[6] *See* Bell Atlantic Comments, at 1. Of course, the new restriction enacted by Congress is presently the subject of a constitutional challenge in federal district court. *SBC Communications, et al. v. FCC and USA*, No. 7-97CV-163-X (D. Texas, filed July 2, 1997). Moreover, in construing such constitutionally suspect statutory provisions, the Commission must do so, to the extent possible, in a way that avoids unconstitutional results. Accordingly, the Commission must construe Section 271 in a way that does not impose on BOCs a restraint on their First Amendment right to communicate to their customers information requested by those customers.

indication that Congress did not intend BOC "conduct and activity" to continue to be judged against the Consent Decree.

The MFJ Court itself even seems to have recognized that the MFJ and the Act are not coextensive. Thus, in officially terminating the Consent Decree in deference to the 1996 Act, the Court acknowledged at least implicitly that even where not expressly spelled out, parties' rights would not be identical under the new Act.[7] In light of the MFJ Court's own recognition of the existence of differences created by Congress between the Act and the MFJ, it would be error for the Commission to rely on rules to which conduct and activities may have been subject in the past as the controlling authority for conduct and activity occurring after those rules were superseded and terminated.

Moreover, even if one engages in hypothetical analysis of how the MFJ Court would rule if presented with NDA service today, it is by no means clear (contrary to the claims of MCI and AT&T) that NDA service would not be permitted. Of course, prior to the passage of the Act, the Court often exerted its authority because of its perception of bottleneck control of the local exchanges by the BOCs, with no meaningful opportunity for competition or competitive pressures to inhibit unfair leveraging of that control. The Act materially changes that paradigm, however, by facilitating competitive entry into the local exchange. Thus, any "MFJ analysis" done today would have to factor in the competitive effects of the hundreds of interconnection and resale agreements into which the BOCs already have entered. AT&T's and MCI's hypothetical assessments that NDA service by the BOCs would be prohibited under the MFJ fail to consider

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[7] *United States v. Western Electric*, Civil Action No. 82-0192, 1996-1 Trade Cas. (CCH) 71, 364 (D.D.C. April 11, 1996), at n.2 (finding that regional companies had made "forceful[]" arguments that the Department of Justice would be unable under the new Act to obtain documents previously obtained pursuant to the Consent Decree).

these real world circumstances. These purported analyses -- based on old rules and partial facts -- are simply incomplete. Accordingly, the Commission must reject them.

II. National Directory Assistance Service is Not an InterLATA Service Subject to Section 271 of the Act.

NDA service is not an "interLATA service," as that term is used in the Act. And, even if NDA service is provided over BOC facilities that are interLATA in character, NDA service remains an "official service" permitted under the MFJ[8] and grandfathered under Section 271(f).[9] Thus, under the applicable principles of Section 271, BOCs are not prohibited from offering NDA service on a centralized basis.

AT&T and MCI take issue with US West's assertion in its Petition that the definition of "interLATA service" in the Act does not reach the provision of telephone numbers to requesting subscribers. As US West showed, an "interLATA service" involves the "interLATA transmission of information chosen by the users between or among [interLATA] points selected by the user."[10] While AT&T and MCI assail US West with respect to its contentions regarding whether provision of any telephone number is a transmission of information across LATA boundaries, neither party contends that any such transmission is among interLATA points selected by the user. Indeed, as BellSouth showed, an NDA user does *not* specify the points of transmission, is at most indifferent to the configuration of the network supporting the call, and very likely is unaware and would be

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8 *United States v. Western Electric*, 569 F. Supp. 1057, 1097-1101 (D.D.C. 1983) ("*Official Services Order*"). While it is inappropriate for the reasons discussed above to rely on MFJ-lore to define post-Act *proscribed* conduct and activities, conduct and activities that were *permitted* under the MFJ were expressly "saved" by the grandfathering provisions of Section 271(f).

9 47 U.S.C. § 271(f).

10 US West Petition, at 7.

surprised to learn that an NDA call (or any DA call) may not be answered locally. Because of this lack of customer specification of the transmission points of NDA service, it is not an interLATA service as that term is defined in the Act.

Moreover, NDA falls within the ambit of "official services" that were preserved to the BOCs at divestiture. MCI and AT&T assert that the preservation of official services applied only to DA service supporting BOCs' exchange and exchange access functions, and that NDA falls outside of that class of permitted activity.[11] Inspection of the *Official Services Order*, which expressly permits DA services and other official service activities, reveals the error in these parties' argument.

In permitting the BOCs to provide official services, specifically including directory assistance services, the MFJ Court expressly rejected a plan of reorganization proposal that would have assigned official services[12] facilities according to the same rules applicable to other transmission facilities. The Court characterized the disfavored proposal as "meaning that, if facilities are used solely or predominantly to perform interLATA functions, they [would] be

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[11] As discussed in BellSouth's and others' earlier comments, different theories have been advanced that are purported to confirm the interLATA character of NDA service, such as the possible later use of a number received from NDA service to place an interLATA call or MFJ-based assertions of what "comprises the business" of interLATA service. These lines of argument have been shown not to be sustainable.

[12] AT&T and MCI attempt to debate whether NDA service falls within the definition of "official services" in the first instance, before it is carved out on the basis of their theory of its interLATA character. However, both parties properly recite the definition of official services, which includes "communications between personnel or equipment of an Operating Company located in various areas and communications between Operating Companies and their customers." *Official Services Order*, 569 F. Supp. at 1097. *See* MCI Comments at 8; AT&T Comments at 6, 8. (Curiously, AT&T thought it appropriate to omit from its two quotations of this passage the Court's acknowledgment that BOC personnel and equipment may be "located in various areas.") In any event, there is no doubt that NDA fits squarely within the foregoing official services definition.

assigned to AT&T even if the functions constitute Official Services."[13] The Court clearly recognized that "the functions [that] constitute Official Services" were inclusive of "interLATA functions," but refused to deny them to the BOCs on that basis.

The Court's recognition that official services included "interLATA functions" was echoed two paragraphs later. The Court concluded "it ma[de] no sense" to prohibit BOCs from providing their own facilities "to conduct Official Services, whether they be intra-LATA or interLATA in character."[14] Clearly, the Court's grant of official services authority to the BOCs was inclusive of functions that meet the official services definition, as NDA does, "whether [those functions] be intraLATA or interLATA in character." And, as an official service permitted in the *Official Services Order*, NDA service is grandfathered under Section 271(f).

Alternatively, even if one accepts *arguendo* that the official services authorization extended only to DA service offered with exchange or exchange access service, AT&T and MCI have implicitly conceded that NDA service falls within that category. That is, by arguing that BOCs and other LECs have obligations with respect to NDA service pursuant to Section 251,[15] MCI and AT&T must have concluded that NDA service offered by local exchange carriers is a local exchange service subject to the LECs' obligations when operating as a LEC. Indeed, if NDA service were an "interLATA service," local exchange carriers would have no obligations with respect to that offering because they would not be operating as LECs in the provision of that service. AT&T's and MCI's Section 251 arguments thus gut their position that NDA service is an "interLATA service."

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13 *Official Services Order*, 569 F. Supp. at 1097-98.

14 *Id.* at 1098.

15 47 U.S.C. § 251.

Accordingly, the Commission must conclude that NDA service is not a prohibited interLATA service for BOCs.

III. NDA Service Does Not Trigger Obligations Under the N11 Order.

In its *N11 Order*,[16] the Commission concluded that "a LEC may not itself offer enhanced services using a 411 code . . . unless that LEC offers access to the code on a reasonable, nondiscriminatory basis to competing enhanced service providers."[17] None of the parties assert, however, that NDA service is an enhanced service. Accordingly, the foregoing obligation is not triggered by a LEC's use of 411 dialing to provide NDA service.

Parties addressing the issue all concur that NDA service is not an enhanced service, but is instead an "adjunct to basic" service.[18] MCI even agrees that US West "correctly characteriz[ed] its National Directory Assistance service as 'adjunct-to-basic.'"[19] For its part, AT&T does not contest the argument that NDA service is not an enhanced service and, in fact, on recent past occasion has expressly stated that it "does not oppose . . . permit[ting] LECs to offer directory assistance services via 411 that include non-local telephone numbers."[20] The Commission thus

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16 *The Use of N11 Codes and Other Abbreviated Dialing Arrangements, First Report and Order,* CC Docket No. 91-105, FCC 97-51 (rel. Feb. 19, 1997) ("*N11 Order*") (petitions for reconsideration or clarification pending).

17 Id. at ¶48.

18 *See, e.g.,* Roseville Comments, at 6-7; Southwestern Bell *et al.*, Comments, at 2-3; Bell Atlantic Comments, at 4; BellSouth Comments, at 8-9.

19 MCI Comments, at 6.

20 *Use of N11 Codes and Other Abbreviated Dialing Arrangements*, CC Docket No. 92-105, AT&T Corp. Comments on Petitions for Reconsideration, at 5 (filed Apr. 23, 1997).

should confirm that NDA service is not an enhanced service[21] subject to the obligations of the *N11 Order.*[22]

IV. Provision of NDA Service by LECs Is Pro-Competitive .

MCI and AT&T complain about LECs' provision of NDA service behind the 411 dialing code because it would "displace" calls they otherwise would receive.[23] This self-preservationist, market position-protection approach to regulatory policy advocacy is at odds with the spirit and intent of the 1996 Telecommunications Act. Indeed, the Act itself contains conditions to ensure competition among carriers for directory assistance services; it does not bar LECs from providing them.

BellSouth concurs with Roseville that LEC provision of NDA service is necessary to promote fair competition in the NDA market. As Roseville notes, already some CLECs and cellular carriers provide NDA service through use of the 411 code.[24] BellSouth also understands that LECs in addition to those submitting comments in this proceeding are offering 411 NDA services. As Southwestern Bell observes, NDA service is desired by customers because of its convenience as a "one-call" information source, particularly in the current period of rapid and

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21 Of course, if the Commission concludes that NDA service *is* an enhanced service, then *all* LECs remain subject to the *N11 Order*. In addition, NDA services presently offered by facilities based IXCs would be subject to the *Computer II* requirement that the underlying facilities be purchased under separately available tariffed terms and conditions.

22 Although this issue is currently pending review in the reconsideration stage of the *N11 Order* rulemaking proceeding, it has been raised in that proceeding pursuant to a request for clarification rather than for a rule modification. Thus, it would not be inappropriate for the Commission to utilize this declaratory ruling proceeding to render that clarification rather than to defer to the rulemaking proceeding.

23 *See* AT&T's Comments, at ii.

24 *See* Roseville Comments, at 8.

widespread changes in area codes.[25] IXCs' attempts to deny these desirable benefits to LECs' customers (or to customers of any subset of LECs) merely to preserve the IXCs' own market positions should not be countenanced.

Nor is there an opportunity for incumbent LECs to achieve unfair advantages in the NDA marketplace. In the first instance, an ILEC's provision of local exchange service is not "tied" to a customer's decision to use the ILEC's NDA service. Customers are not required to use an ILEC's NDA service in order to receive local exchange service.[26] Customers remain free to use any other provider's NDA service, whether it be an IXC's offering, such as those of AT&T or MCI, or another source, such as the internet.

Further, Congress has ensured that local competitors of the incumbent LEC have the opportunity under Section 251 to resell the ILEC's NDA service or to build their own NDA service. Thus, because NDA service is offered through local exchange tariffs, it is subject to the same resale discounts established in the respective states for other such services. Similarly, competing local exchange carriers may obtain 411 dialing parity pursuant to negotiated interconnection agreements with ILECs[27] and may develop their own NDA databases.[28] In light

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[25] Southwestern Bell Comments, at 2.

[26] *See* Roseville Comments, at 3-4.

[27] To the extent any requesting carrier contends that an individual LEC has not met its obligations under Section 251, the requesting carrier has recourse to the respective state regulatory commissions for arbitration, and then to federal district court. *Iowa Utilities Board v. FCC*, No. 96-3321 (8th Cir., July 18, 1997). AT&T's and MCI's generalized arguments of what the Commission should require of BOCs under Section 251 provide no basis for such relief in this proceeding.

[28] As US West notes in its Answer to MCI's Complaint against it, a CLEC may contract with the same third party NDA database vendor as the ILEC or may pursue a different source. DA information in BellSouth's database regarding its own customers is available to CLECs pursuant to interconnection contracts.

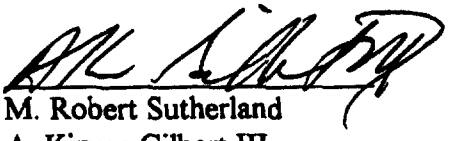
of this clear opportunity for CLECs to provide their own NDA offerings, there can be no statutory basis for denying ILECs the same opportunity. To do so would be clear error.

CONCLUSION

For the reasons set forth above and in its Comments, BellSouth urges the Commission to confirm that BOCs are permitted to provide NDA service in conjunction with, and in the same manner as, existing DA service, using the 411 dialing code.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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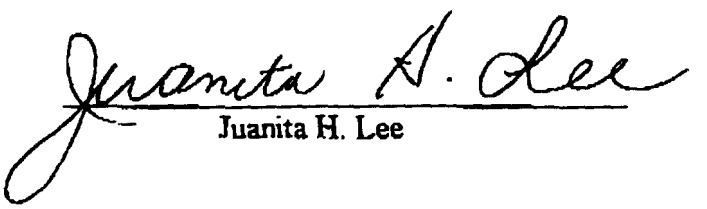
CERTIFICATE OF SERVICE

I hereby certify that I have this 17th day of September, 1997 served all parties to this action with a copy of the foregoing **BELLSOUTH REPLY** by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached service list.



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